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No. 83-1791

In the Supreme Court of the United States

OCTOBER TERM, 1983

LUELLA BREEN, ET AL., PETITIONERS

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioners seek review of the judgment of the court of appeals vacating a decision by the Secretary of Labor to rescind the ban on homework in the knitted outerwear industry.

1. The Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, delegates authority to the Secretary of Labor to regulate, restrict, or prohibit industrial homework as necessary or appropriate to "prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this [Act]." 29 U.S.C. 211(d). Under this authority, in the 1940's, the Secretary issued regulations restricting the employment

of industrial homeworkers in seven industries, including the knitted outerwear industry. Homework was, and continues to be, permitted in all other industries.

On May 5, 1981, the Secretary published a notice of proposed rulemaking soliciting comments on a proposal to rescind the ban on homework in all seven industries. Approximately 10,000 comments were received in response. The Secretary also conducted hearings on the proposal in Burlington, Vermont, and Washington, D.C.

Based on this administrative record, in October 1981, the Secretary rescinded the ban on homework in the knitted outerwear industry, while retaining the homework ban in the six other industries. See Pet. App. 167-174. The Secretary determined that "continuation of the restrictions would have an adverse effect on employment opportunities," particularly in rural areas where public transportation is not available and few or no other gainful employment opportunities exist. *Id.* at 172. He determined further that, although effective enforcement of the mimimum wage provisions was not possible without a homework ban 40 years ago, when homeworkers constituted more than 20% of the workforce and the concept of a minimum wage was novel and not widely accepted, an effective enforcement program is now possible. The Secretary pledged to "undertake a concerted compliance effort in this industry" and to reevaluate the homework ban on the basis of experience with minimum wage compliance under present day conditions. *Id.* at 173.

2. Upon issuance of this rule, plaintiff-respondents (the Union, several employers, and several individuals in the factory knitted outerwear industry) filed suit in the United States District Court for the District of Columbia challenging the rule. They contended that the rule was contrary to

the Fair Labor Standards Act and had been issued in violation of the Administrative Procedure Act, 5 U.S.C. 553. Petitioners (individual homeworkers and home knitting employers) intervened to support the Secretary's decision.

In July 1982, the district court upheld the rule (Pet. App. 67-103). Although the court upheld plaintiff-respondents' standing to challenge the rule, it rejected their argument on the merits that the Secretary lacked authority under the Act to rescind the homework ban. The court concluded that the rule was neither arbitrary nor capricious, and was supported by a concise, but adequate, explanation of reasons. The court also noted that the Secretary's decision to rescind the ban was experimental and that the Department would continue to study the issues raised concerning enforcement of the Act.

Plaintiff-respondents appealed. In November 1983, the court of appeals reversed the district court's judgment and vacated the Secretary's action (Pet. App. 1-65). The appellate court's decision was predicated solely on perceived inadequacies in the Secretary's explanation of the rule; the court did not question the Secretary's authority to rescind the homework ban on a proper record and with appropriate explanation. Specifically, the court held that: (1) the record failed to support sufficiently the Secretary's conclusion that he could properly enforce the Act among home knitters (*id.* at 42-60); (2) the preamble to the final rule did not adequately address alternatives to full lifting of the ban (*id.* at 37-43); and (3) the Secretary did not consider the possible detriment to employment opportunities for factory workers (*id.* at 60-64). The court ordered that the matter be remanded to the Secretary for further proceedings as appropriate.

Petitioners filed a petition for rehearing, which was denied on February 1, 1984. In March 1984, the district court remanded the matter to the Secretary for further proceedings.[1]

3. We agree with petitioners that the court of appeals erred in concluding that the Secretary's explanation for the rule permitting homework in the knitted outerwear industry was legally inadequate.[2] A ban on homework is a drastic remedy, which severely restricts employment opportunities for persons who find it difficult or inconvenient to work in a factory setting or need to care for children or other dependents at home. It has not been considered necessary in the vast majority of industries, where other forms of regulation have sufficed to enforce the minimum wage laws.

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[1]Further developments, not directly relevant to the instant petition, took place subsequent to remand. On March 27, 1984, the Secretary published for public notice and comment a proposal again to permit homework in the knitted outerwear industry. 49 Fed. Reg. 11786. Because these new rulemaking proceedings were expected to take several months, the Secretary simultaneously issued a limited 120 day emergency rule lifting the homework ban for those persons who had legally engaged in home knitting during the more than two year period of the litigation (*id.* at 11792). Plaintiff-respondents challenged this emergency rule in district court, arguing that it was inconsistent with the court of appeals' mandate. The district court treated their challenge as a request for a preliminary injunction, and denied it on April 11, 1984. Plaintiff-respondents then filed a motion to enforce the mandate in the court of appeals. That court ruled that the district court had erred in viewing their challenge as a request for a preliminary injunction, and remanded to the district court. On May 8, 1984, the district court held that the emergency rule violated the mandate. The Secretary has appealed that ruling, and the appeal is pending. On May 18, 1984, the Chief Justice denied motions by the government and the petitioners for a stay of that decision pending review by the court of appeals. The issues in that litigation are wholly separable from those raised in this petition.

[2]We also agree with petitioners that plaintiff-respondents lack standing to challenge the rule.

Whether to perpetuate the homework ban is fundamentally a question of policy, delegated to the Secretary by statute. The decision hinges on questions uniquely within the Secretary's discretion, such as allocation of enforcement resources and judgments regarding their probable effectiveness.[3] In lifting the ban, the Secretary decided to deploy more resources to the task of enforcing the minimum wage directly, rather than relying exclusively on a prophylactic rule that prohibits legal, as well as illegal, operations.

Whether to perpetuate the homework ban also involves policy judgments regarding the relative weight to be accorded ease of law enforcement on the one hand, and claims of economic liberty on the other. The Secretary made his choice, and explained it. It is not the function of courts to substitute their judgment for that of the Secretary on matters of this kind. See *Chevron U.S.A., Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984), slip op. 26-28.

Nonetheless, we do not believe that review by this Court is necessary at this juncture. The Secretary has concluded that the most expeditious way of dealing with the decision

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[3]The court of appeals found that "[t]he evidence in the record [concerning feasibility of enforcement] is at best minimal" (Pet. App. 43 (footnote omitted)). But since homework has been banned in this industry for more than 40 years, it is obvious that there could be no hard evidence regarding enforceability under future, changed, conditions. The Secretary, however, is entrusted with the discretion to determine whether a homework ban is "necessary or appropriate" (29 U.S.C. 211(d)), and such determinations are entitled to substantial deference by the courts. *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582, 594-595 (1981); *Building & Construction Trades' Department* v. *Donovan,* 712 F.2d 611, 629 (D.C. Cir. 1983), cert. denied, No. 83-697 (Jan. 16, 1984). The court of appeals simply substituted its judgment for that of the Secretary. (It is interesting that during the period homework was permitted in the knitted outerwear industry, the Secretary's judgment was borne out; for investigated firms, the FLSA compliance rate among homeworkers was "roughly comparable to that found in all covered industries." 49 Fed. Reg. 11794 (1984).)

below is to institute a new rulemaking that will address the issues identified by the court of appeals. The Secretary issued a new notice of proposed rulemaking on March 27, 1984, and expects to complete the rulemaking within the next two to three months. If a new rule is issued, it may well moot litigation on the previous rule. See *Center for Science in the Public Interest* v. *Regan,* 727 F.2d 1161 (D.C. Cir. 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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